

Supreme Court, U. S.
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In The
Supreme Court of the United States

OCTOBER TERM, 1975

No.**76-282**

DR. DON M. SMART,

Petitioner,

v.

CLARENCE JONES, et al,

Respondents.

**BRIEF OF TEXAS POWER & LIGHT COMPANY,
ET AL., RESPONDENTS, IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

FRANK M. RYBURN, JR.

1511 Fidelity Union Life Bldg.

Dallas, Texas 75201

214/741-5811

*Counsel for Respondents Texas
Power & Light Company, J. F.
Skelton and Robert E. Burns*

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Respondents pray this Honorable Court to deny the Petition for a Writ of Certiorari for the reason that the judgment below is correct, just, and supported by an unbroken legion of decided cases in point, including cases heretofore decided by this Honorable Court.

PREFACE

The Petition for Writ of Certiorari is yet another chapter in a tone of harassing, vexatious and frivolous attempts (first com-

menced over twenty years ago in 1955) by Petitioner or his attorney to burden the courts with their disagreement with the philosophy that public service corporations have properly been granted by the State the power to take private property for a public purpose upon the payment of just compensation.

In 1955, plaintiff's attorney, S. L. Lewis, challenged the authority of Texas Power & Light Company, Respondent herein, to survey his land preparatory to its filing a condemnation action. The Texas Court of Civil Appeals affirmed an injunction granted by the trial court restraining Lewis from interfering with the survey. *Lewis v. Texas Power & Light Company*, 276 S.W. 2d 950 (Tex.Civ.App. 1955, error ref'd, n.r.e).

During the pendency in the state courts of the Lewis condemnation suit, referred to above and involving the same tract of land, S. L. Lewis, on behalf of his sister, brought an action in the United States District Court against Texas Power & Light Company and its parent company challenging the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the action. *Baber v. Texas Utilities Company, et al.*, 128 F.Supp. 753 (N.D.Tex. 1955), aff'd 5 Cir. F.2d 665 (1956).

In 1972, Petitioner's attorney, S. L. Lewis, instituted an action in the United States District Court against Texas Power & Light Company, its parent and associated companies, and substantially all other electric and gas utility companies in Texas, again attacking the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the

action. *Lewis v. Texas Power & Light Company, et al.*, 5 Cir. 462 F.2d 1318 (1972).

While the above case, *Lewis v. Texas Power & Light Company*, was pending in the 5th Circuit and before its decision, Lewis filed in the U.S. Supreme Court his petition for Writ of Mandamus and in the alternative for Writ of Certiorari against the Chief Judge of the 5th Circuit and the trial judge, seeking reinstatement of the case on the trial docket. This Court denied the motion. *Lewis v. John R. Brown, Chief Judge, et al.*, 404 U.S. 891, 92 S.Ct. 74, 30 L. Ed. 119 (1971).

In 1972, Don Smart, represented by the same S. L. Lewis who instigated the previous actions, brought suit against Texas Power & Light Company and the Governor and Attorney General of Texas, again alleging the invalidity of the Texas condemnation laws in regard to a condemnation suit filed in Collin County, Texas, in 1970. The action of the trial court in dismissing the action was affirmed by the 5th Circuit. *Don M. Smart v. Texas Power & Light Company, et al*, 5 Cir., 525 F.2d 1209 (1976). From such action, plaintiff has recently petitioned for a Writ of Certiorari from this Court.

Later in 1972, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U. S. District Court against the Dallas County Sheriff and his deputies, a Dallas County District Attorney, the Dallas County Criminal Judge and the Rockwall County District Judge in whose Court the 1972 Don Smart condemnation proceeding was pending, alleging false arrest in connection with Smart's allegedly interfering with the service of process in the condemnation proceed-

ings. The 5th Circuit affirmed a judgment against the plaintiff. *Nancy Gayle Smart v. Jones*, 5 Cir., 493 F.2d 63 (1974), reh. den., 5 Cir., 495 F.2d 1372 (1974). This Court denied petition for Writ of Certiorari, 419 U.S. 1090, 95 S.Ct. 681, 42 L.Ed.2d 882 (1974), and denied petition for rehearing, 420 U.S. 939, 95 S.Ct. 1151, 43 L.Ed.2d 417 (1975).

In 1973, Don Smart, represented by S. L. Lewis, brought a civil rights action in the U.S. District Court against the Dallas County Sheriff and his deputies, the District Attorney and his assistants, and Texas Power & Light Company and its president and its attorney, alleging the invalidity of the Texas condemnation laws and false arrest for allegedly interfering with the service of process upon him in the condemnation suit involved in the instant controversy in which he has petitioned this Court for a Writ of Certiorari. The trial court granted defendant's motion for summary judgment, and upon plaintiff's appeal, the 5th Circuit affirmed. *Don Smart v. Jones, et al*, 5 Cir., 530 F.2d 64 (1976). The instant proceeding involves Don Smart's petition to this Court for a Writ of Certiorari.

In 1974, Scott Smart, the brother of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its attorney and the District Judge of Collin County, Texas, in which the Don Smart condemnation suit was pending, alleging the invalidity of the Texas condemnation laws and that the Collin County proceedings were void because of his non-joinder as a party. The trial court dismissed the action because of Scott Smart's lack of standing by reason of his claim under a conveyance which was

unrecorded until 2½ years after commencement of the Collin County proceedings. The 5th Circuit affirmed the dismissal. *Scott Smart v. Texas Power & Light Company, et al*, 5 Cir., 525 F.2d 1211 (1976). From such action plaintiff has recently petitioned for a Writ of Certiorari from this Court.

Later in 1974, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its president and attorney, alleging the invalidity of the Texas condemnation laws and deprivation of her constitutional rights, said action being based upon the same facts and occurrence as she had alleged in her previous action against the Dallas County Sheriff, et al. Defendants' motion to dismiss this action on the ground of *res judicata* and collateral estoppel is pending in the trial court. *Nancy Gayle Smart v. Texas Power & Light Company, et al*, No. CA3-74-870-F in the U.S. District Court for the Northern District of Texas, Dallas Division.

STATEMENT OF THE CASE

These three Respondents, Texas Power & Light Company, its President, J. F. Skelton, and one of its attorneys, Robert E. Burns, respectfully submit that Petitioner's "Statement of the Case" is inaccurate and misleading. The true facts are set forth in their Motion for Summary Judgment and an attached affidavit. (R. 226-234) Their Motion was based in part upon the ground that neither the facts nor allegations of Petitioner indicate that these Respondents had anything to do with Petitioner's arrest and jailing other than to file a Petition to condemn an electric utility right-of-way across Petitioner's (and others')

land and request that service of citation be made by the Sheriff's Department. The result is that as a matter of law these three Respondents were and are entitled to summary judgment herein, there being no genuine issue of a material fact herein. Succinctly, the true facts are these. (R.226-234)

In 1972 Respondent Burns, as attorney for Texas Power & Light Company (hereinafter called "Company"), prepared and filed a Petition in condemnation on behalf of Company to condemn an easement for an electric power line on land owned by Petitioner and others in Dallas County. The Petition and related papers were delivered to the Judge of the proper court in Dallas, and thereafter Respondent Burns mailed a letter to the Sheriff of Dallas County enclosing the pertinent papers and requesting that the Sheriff serve notices of hearing and copies of the Petition on the various defendants, including Petitioner. At that time neither Respondent Burns nor Respondent Company nor Respondent Skelton, who was the President of Company, were acquainted with the various members of the Sheriff's Department who were named by Petitioner in his Petition as defendants in this case.

In the subsequent efforts by the Sheriff's Department to secure service of Citation upon the defendants, neither Respondent Burns nor Respondent Skelton nor any representative of Respondent Company had any contact with the Petitioner nor any other landowner who was named as a defendant in the condemnation proceeding. Likewise, at no time during the above period did Respondent Burns, Respondent Skelton or any other representative of Respondent Company discuss with any other defendant-Respondent in this action the method of

service of notice on the Petitioner nor that he should be followed, stopped, arrested, jailed, reported, mugged, harassed, deprived of freedom nor deprived of any legal or constitutional right; and in fact there was no contact or conspiracy whatsoever between these three Respondents and the other defendants-Respondents.

Because the Sheriff in California reported that he was unable to secure timely service upon another defendant in the case, and because the electric power line needed to be built without delay, the condemnation hearing was cancelled by Respondent Burns, an agreement was worked out with an adjoining landowner to place the electric power line on his property, and the condemnation proceeding against the Petitioner and others was thereupon dismissed.

Therefore, as to these three Respondents, the undisputed facts show only that they filed an eminent domain proceeding, that service of the required notices upon the landowner-defendants was requested of the Sheriff's Department, that these three Respondents thereafter had no connection with any effort made to obtain such service, and yet the Petitioner filed suit against these Respondents for damages for his alleged improper arrest. As the Court can readily see from an examination of the Petition for Writ of Certiorari on file herein and the allegations in Petitioner's Original Complaint, these Respondents are entitled to judgment as a matter of law.

REASONS FOR DENYING THE WRIT

Entirely apart from any of the "Questions Presented" by Petitioner in his Petition for Writ of Certiorari, the bald fact

remains that the motion for summary judgment filed by these three Respondents in the trial court was, under the undisputed facts, the undisputed law and Petitioner's own factual allegations, properly granted by the trial court and properly upheld by the intermediate appellate court. These three Respondents (as well as all other Respondents, actually) never should have been subjected to participation in this suit.

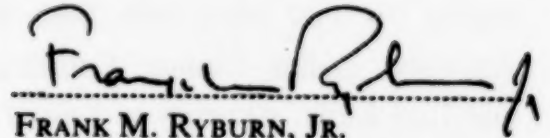
Likewise, as to Question No. 2 raised by Petitioner, i.e., that the Fifth Circuit Court of Appeals was confused in referring to its opinion in *Smart v. Texas Power & Light Co.*, 525 F.2d 1209 (5th Cir. 1976), an earlier case, Petitioner is in error again. The Court correctly referred to its earlier opinion in reaching the conclusion that Petitioner's contentions that condemnation proceedings were illegally instituted were all answered and refuted by its earlier opinion.

CONCLUSION

There is no merit to Petitioner's Petition for Writ of Certiorari any more than there was any merit to the contentions made in the series of cases described in the Preface, *supra*. The judgment of the courts below are correct and just.

WHEREFORE, Respondents pray this Honorable Court to deny a Writ of Certiorari in this case.

Respectfully submitted,



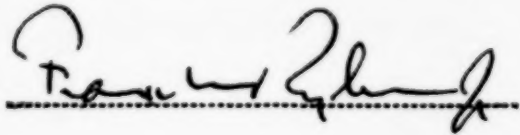
FRANK M. RYBURN, JR.

1511 Fidelity Union Life Bldg.
Dallas, Texas 75201
214/741-5811

*Counsel for Respondents Texas
Power & Light Company, J. F.
Skelton and Robert E. Burns*

CERTIFICATE OF SERVICE

I, Frank M. Ryburn, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing "Brief of Texas Power & Light Company, et al., Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" by mailing three copies of same by United States Mail, postage prepaid, on September 14, 1976, to each, Mr. S. L. Lewis, 5614 Richmond Street, Dallas, Texas 75206, counsel of record for Petitioner, and John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202 and Earl Luna, Attorney at Law, 1002 Dallas Federal Savings Bldg., Dallas, Texas 75201, counsels for other Respondents.



Handwritten signature of Frank M. Ryburn, Jr. over a horizontal line.